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No. _____

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
1987 Term

JAMIE E. COKER,
Petitioner

v.

R. A. GIELOW, Chairman of the
Railroad Retirement Board, et al.,
and
the UNITED STATES RAILROAD
RETIREMENT BOARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S WRIT OF CERTIORARI and BRIEF IN SUPPORT

JAMIE E. COKER, pro se
1031 Gloria Road
Memphis, TN 38116

CERTIORARI SHOULD BE GRANTED

QUESTIONS TO REVIEW.

1. Whether the Court erred when finding that the Board properly computed the Petitioner's benefits due under the Railroad Retirement Act of 1974, 45 U.S.C. § 231, as amended;

2. Whether the Court erred in AFFIRMING the Board's decision of 45 U.S.C.§§ 228, 231:

a. When the Board and Court found certain cost-of-living increases ("COLAs") were not due Petitioner;

b. When the Board reduced Petitioner's annuity payment below the amount afforded him under the Railroad Retirement Act of 1937 or under the Social Security Act;

3. Whether Petitioner was denied due process when Petitioner's appeal was processed on a record which contained 147 "inaudibles".

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Jamie E. Coker v. R. A. Gielow, -- F.2d -- (6th Cir. 1987), Appendix "A", rendered December 3, 1986, AFFIRMED the Railroad Retirement Board's ("Board") computation of Petitioner's annuity benefits. The JUDGMENT was entered December 3, 1986, A True Copy, Appendix "B". ORDER DENYING PETITION FOR REHEARING was entered January 5, 1987, A True Copy, Appendix "C". ORDER DENYING MOTION TO RECALL THE MANDATE AND FOR REHEARING was entered February 11, 1987, A True Copy, Appendix "D".

JURISDICTION

Jurisdcition is founded upon 28 U.S.C. § 1332, for grievances arising under 45 U.S.C. § 231, and the Fourteenth Amendment to the United States Constitution.

FEDERAL RULES INVOLVED

Supreme Court Rule 17.1(c) prescribes that when a "federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court" due consideration should be given to granting certiorari.

STATEMENT OF THE CASE

Petitioner worked in the railroad industry for 23.25 years, ending in 1970. During this time, contributions were made to his retirement fund pursuant to the Railroad Retirement Act of 1937, formerly 45 U.S.C. § 228, et seq. Petitioner also engaged in work outside the railroad industry before railroad service. During a five year period, he also worked for the railroad and outside the railroad industry at the same time. Petitioner's Social Security account was

either contributed, or credited for this non-railroad work. As of January 1, 1975, the enactment date of the Railroad Retirement Act of 1974, 45 U.S.C. § 231, et seq. Petitioner had earned vested interests in two pension funds, the railroad's and Social Security's pensions. The Railroad Retirement Act of 1974 superseded the 1937 Act.

Since January of 1971, Petitioner has been continuously employed in non-railroad activity and during this 17 year period, has made contributions to his Social Security pension. As a result, to date Petitioner has 23.25 years of contributions to the railroad retirement plan and over 23 years of contributions to the non-railroad, or Social Security, retirement plan--for a total of 47 years.

STATEMENT OF THE FACTS

In May 1981, pursuant to 1974 amendments to the Railroad Retirement Act of 1937, Petitioner first became entitled to receive the benefits of his railroad retirement annuity. Once this award was received Petitioner questioned its calculation, claiming the annuity

amount had been improperly computed and based on errors of law and fact. After hearing on October 18, 1983, an administrative referee in a May 16, 1984 decision, found with limited exception, that the Agency's calculations were correct. This decision was summarily affirmed on October 22, 1984, by the three-member Board. The United States Court of Appeals, Sixth Circuit, affirmed the Board's decision on December 3, 1986, -- F.2d --, Appendix "A" and rehearing was denied on January 5, 1987, and again on February 11, 1987--"C","D".

REASONS FOR GRANTING WRIT

The questions presented have not been addressed by this Court. Research would reveal that there is only one circuit court of appeals decision on this subject, the case presently before the Court. This is surprising, however. While there is only a single petitioner before the Court, literally thousands of retirees from the railroad industry have been affected by the stance of the Board, and necessarily of the Sixth Circuit. The issues presented touch the most fundamental interest of these retirees--their very livelihood. Certitorari should be

granted due to these significant issues involved and to prevent an ACT of INJUSTICE.

ARGUMENT

The only Railroad Retirement plan Petitioner contributed to was under the 1937 Act. Under that Act, as it then existed, persons could, in essence, earn two full pensions; and, before its repeal, Petitioner had done just that. A person could work in the railroad industry until becoming a pension "vested" employee, and then work outside the industry, and, thus gain an additional pension through a private or public plan, usually Social Security. A person could reverse the order of employment, or also engage in both railroad and non-railroad activities concurrently, to achieve the same effect. Upon retirement, the worker would receive two full pensions--one from the railroad industry and another from Social Security.

In 1951, the Railroad Pension Fund became re-insured by the Social Security Administration. "The Social Security Act prohibits payment of multiple benefits to any individual under that Act. For this reason, whenever an individual

receiving Railroad Retirement benefits also qualifies for Social Security benefits, the amounts paid to the Railroad Retirement system under the financial interchange on account of that individual are reduced by the total of the Social Security benefits which that individual receives." S. Rep. No. 1163. 93rd Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 5702, 5703. This caused a disproportionate drain upon the Railroad Retirement Fund since a person would be entitled to Social Security benefits based upon relatively small contributions to that fund. This drain eventually resulted in a crisis and the fund was on the brink of bankruptcy. The Railroad Retirement Act of 1974 was designed to correct these fiscal problems. Appendix A-4. When doing so, Congress recognized that it would necessarily be required to eliminate benefits which were previously allowed.

An attempt was made to be as "equitable" in these "cuts" as possible. The major problem in accomplishing these objectives is that of "dual beneficiaries" retirees, as described

above, who had already earned two supposedly independent pensions prior to the enactment of the 1974 Act. The 1974 Act, accordingly, provided a scheme "intended to phase out the dual benefits in as equitable a manner as possible." Appendix A-5. It was decided that Congress would fund the future drain that dual vested retirees had on the system through separate funding. It is the Board's apparent misapplication of this scheme for which Petitioner complains.

The 1974 Act, first, had no substantive effect on employees already retired prior to its enactment. For instance, John Doe, who retired under the 1937 Act prior to 1975, would receive checks equal to a full railroad pension and a full Social Security pension.

For persons who as of 1975 were not entitled to dual pensions, the Act established, in effect, a tiering system for computing benefits. This is the primary means by which benefits are calculated and was the method by which the Board calculated the Petitioner's monthly annuity. While Petitioner contests numerous factual errors in the Board's computation, he

also realizes that certitorari will not be granted by this Court in order to address these inequities.

An additional method of computing benefits was made available to certain "dual vested" persons who still had a current connection with the railroad. This method discussed below, is to be used when it would provide greater benefits than the tiering system.

The first tier included payments for contributions due to all types of work, railroad and non-railroad. The contributions would be combined and a Social Security component applied. Using the Board's calculation as of October 1, 1984, Petitioner is said to be currently entitled to Gross Tier I benefits of $631.00 per month. This amount is reduced by an age reduction factor, $126.20, and, since Social Security employment is considered, Petitioner's equivalent Social Security entitlement of $404.00 is also subtracted from Tier I benefits. After reduction, Petitioner's net Tier I benefits equal only $100.80.

The second tier consists solely of a

railroad-related component. This is, in essence, the same amount a retiree was entitled to under the 1937 Act as a supplemental benefit. Again, while Petitioner contests its calculations, the Board has determined this amount to be $19.18.

An additional tier is available to certain "dual vested" retirees. This tier is designed to replace at least some of the dual-benefits eliminated by the 1974 Act; and, apparently for want of a better term, the tier is called a "windfall benefit." This tier considers only work performed prior to the effective date of the 1974 Act, and compares railroad work and combined work, and subtracts the difference from a component considering only Social Security contributions. The Board has calculated the Petitioner's "windfall" benefit as $114.09. Using the Board's own calculations, Petitioner is entitled to a total railroad annuity of $234.07, as of October 1,1984.

Petitioner contests the appropriateness of the Board's reduction of Petitioner's annuity, when using the tiering system, below the

guaranteed amount set forth in the Act, 45 U.S.C. § 231b(a) states:

> The annuity of an individual under section 2(a)(1) of this Act [the tiering system] shall be in an amount equal to the amount . . . of the old-age insurance or disability insurance benefit to which such individual would have been entitled under the Social Security Act. . . .

The Social Security Administration has established that Petitioner is entitled to old-age retirement benefits in the amount of $404.00. As the evidence would reflect, the Board's calculations reduced Petitioner's Tier I RAILROAD annuity below this threshold amount. There is a vast difference in reducing the Social Security benefits from the COMBINED annuity and the RAILROAD annuity as reflected in the findings of the Court, A-3; further, his Social Security should not affect the amount of his RAILROAD retirement annuity. Appendix A-8. The difference is found in the words COMBINED, meaning combination of railroad and non-railroad work, while RAILROAD annuity refers only to pension earned while working in the railroad industry 23.25 years.

Likewise, "Subdivision (2) of subsection (f) guarantees that, in cases where an employee's annuity under the new Act began to

accrue before January 1, 1983, the total of the annuities (other than amounts payable under subsection (h)) and supplemental annuity payable to the employee and his spouse for any month under the new Act (before any reduction due to receipt of social security benefits and before any reduction pursuant to the earnings limitations provisions of section 2(f) of the new Act) cannot be less than the total amount that would have been payable to the employee and his spouse for that month under the provisions of the Railroad Retirement Act of 1937 as in effect on December 31, 1974, on the basis of the maximum monthly compensation creditable at that time." S. Rep. NO. 1163, 93rd Cong. & Admin. News 5702, 5734. Petitioner was entitled, as of December 31, 1974, to an annuity based upon 1937 computations in the amount of $309.00. Appendix A-9. The Board's award of $234.07 is clearly below this amount. As shown above, the amount under subsection (h), $114.09, is not to be included in the $234.07, but the calculations as shown amounting to net Tier I, $100.80, plus

supplemental annuity, $19.18, includes the $114.09 in the $234.07 amount making it far below the $309.00 railroad guaranty amount.

The second method of calculation of benefits is available only to certain retirees. A judicial determination has been made that Petitioner qualifies for such status. Appendix A-8. Under this system, a retiree is in essence, entitled to benefits as if he had retired under the 1937 Act. 45 U.S.C. § 231b(f)(2) states inter alia:

> [If computation using the tiering method] is less than the total amount which could have been payable to such individual and his spouse for such month, on the basis of the individual's compensation and years of service, under the provisions of the Railroad Retirement Act of 1937 as in effect on December 31, 1974. . . the annuity of such individual and the annuity of such spouse, if any, shall be increased, without regard to the provisions of subsection (1) of this subsection, proportionately so as to equal such total amount.

Under the 1937 Act, Petitioner would be entitled to, under the Board's calculations, a Railroad Retirement annuity in the amount $309.00. Appendix A-9. Petitioner would also

be entitled to a supplemental benefit again based solely on railroad service. As outlined above, this amount, at a minimum, would equal $19.18. Plus, under the 1937 Act, Petitioner would be entitled to a full Social Security pension in the amount of $404.00 for a collective "dual" benefit of $732.18. As clearly may be seen, this amount is far more than the total benefits now being paid Petitioner, $638.07; and, therefore, annuity should have been calculated on this basis.

Markedly absent from this calculation are cost-of-living adjustments, or "COLAs". It is the lower court's opinion, along with that of the Board, that cost-of-living increments are not to be computed on these funds. The lower court found authority in the phrase "as in effect on December 31, 1974". Appendix A-9; see, 45 U.S.C. § 231b(f)(2). Such an interpretation is curious to say the least. There was no cost-of-living increments in place as of December 31, 1974. COLAs were first legislated by Congress in 1975 for the purpose of providing equal buying power to all retirees, and for adjusting for the

effects of inflation. Persons retiring prior to enactment of the 1974 Act received cost-of-living adjustments. It is absolutely clear from a reading of the legislative history of the 1974 Act that those select persons retiring under 45 U.S.C. § 231b(f)(2), which is cited above are entitled to treatment as if they retire under the 1937 Act. Discrimination between this two classes of retirees has no "reasonable basis in law". Brotherhood of RR Trainmen on the Mongahelia Connecting RR Co. v. Railroad Retirement Board, 410 F2d 353, 357 (3rd Cir. 1969).

Contrary to the Board's position, the former 45 U.S.C. § 209 require COLAs to be added to any railroad annuity:

> Whenever monthly insurance benefits under section 202 of the Social Security Act are increased, the amount of each annuity provided by section 202(a), section 203(a), paragraph (1) of section 204(a), paragraphs (1) and (2) of section 207 shall be increased in the same manner, and effective the same date as other annuities of the same type payable under section 2 of the Railroad Retirement Act of 1974 are increased.

In fact, the evidence would reflect that the Secretary of the Treasury is currently transferring to the Railroad Retirement Board

funds equivalent to the COLAs due upon Petitioner's 1937 annuity of $309.00. These funds are not, however, being forwarded to the Petitioner. More accurately, today the Railroad Retirement Board receives $920.09 through the interchange with the Secretary of the Treasury and the Social Security Administration, yet Petitioner's monthly payment is only $676.54.

Further, Petitioner's annuity is improperly being reduced by the 1981 and 1983 amendments to the 1974 Act. Both amendments contained Benefit Preservation Sections. Public Law 97-35, 1981 Amendment states:

> Sec. 1129. (a) Except as otherwise provided in this section, the amendment made by this subtitle shall take effect October 1, 1981, and shall apply only with respect to annuities awarded on or after that date.

Likewise, the 1983 amendments contained similar language. See Public Law 98-76, quoted in Appendix, E-2; also Public Law 96-582, 1981 Amendment, effective June 1, 1981, quoted in Appendix, E-1, which the Agency did not award to Petitioner.

There has been a prior judicial determination that Petitioner was paid benefits from

May 1, 1981. The Circuit Court stated: "Coker filed his claim for early railroad retirement benefits in May, 1981 (the month he turned sixty-two), and was awarded an annuity." Appendix, A-4. The Board applied a 20% age reduction penalty to his annuity, only applicable in month of May as required in 1974 Act, 45 U.S.C. § 231a 2(a)(1)(iii) quoted in Appendix E-1. Obviously the Board is using the date of their final decision as an award date, which is improper.

Additionally, Petitioner was denied his due process rights by being required to prosecute his appeal based upon a transcript containing a substantial number of "inaudibles". The short transcript contained at least 147 "inaudibles". Whole sentences were not transcribed, leaving the court to merely assume the context of what was said. Due process requires that Petitioner have made available to him a record for which he may prosecute a claim.

CONCLUSION.

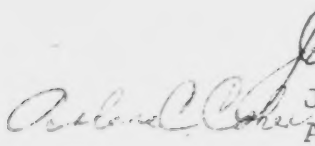
It is inconceivable that Petitioner has worked to date some 47 years (1940-1987) and

continuing to work and pay Social Security Self-Employment taxes each year, but is paid only $676.54, FULL pension annuity for the COMBINED railroad and non-railroad retirement taxes he paid for a life time of work. Plus, the fact that the lower court found he is not due the cost-of-living increases legislated and funded by Congress for all retirees whatever law they retired under. What is even more inconceivable is the fact the Petitioner is required to pay Social Security Self-Employment Retirement Taxes for the rest of the years he continues to work, but has no hope of ever receiving any benefits for the taxes he pays, yet the Social Security Administration pays the benefits to the Railroad Retirement Board but the Board does not pass on to Petitioner. It is unconstitutional to require Petitioner to pay retirement taxes on which he gets no benefit.

Substantial issues affecting numerous claimants are presented by way of this PETITION for CERTIORARI. These issues have not properly been addressed by any circuit

court of appeals. For the above reasons, CERTIORARI should be GRANTED so that the parties could be given an opportunity to more adequately brief the issues presented.

Respectfully submitted,



JAMIE E. COKER, Petitioner
Arlene C. Coker, Wife
and Attorney-in Fact
1031 Gloria Road
Memphis, TN 38116
(901) 398-1234

No._____

APPENDIX

Decision, December 3, 1986. . . . . ."A" 1-11

Judgment, December 3, 1986. . . . . "B"

Order Denying Rehearing
January 5, 1987. . . . . "C"

Order Denying Recall
for Mandate and Rehearing. . . . . "D"

Statutes:

"Benefit Preservation"
45 U.S.C. § 231b (ℓ) P.L. 97-35 "E"-1
45 U.S.C. § 231d P.L. 98-76 . . "E"-2

Age Reduction Penalty
45 U.S.C. 231a 2(a)(1)(iii). . . . "E"-1

Tier II increase, June 1, 1981
45 U.S.C. § 231b (g) P.L. 96-582 . "E"-1

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 85-3864

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMIE E. COKER,
Petitioner,

v.

R.A. GIELOW, Chairman; C.J. CHAMBERLIN, Member; J.O. CRAWFORD, Member; MICHAEL ALTMANN, Executive Officer; and UNITED STATES RAILROAD RETIREMENT BOARD,
Respondents.

ON PETITION to Review a Decision of the United States Railroad Retirement Board.

Decided and Filed December 3, 1986

Before: MARTIN, GUY and NORRIS, Circuit Judges.

GUY, Circuit Judge. Claimant, Jamie Coker, appeals from the decision of the Railroad Retirement Board, contending that the Board improperly computed the amount of his annuity. Finding no error in the computations, we affirm.

Plaintiff essentially argues (1) that his social security benefit amount of $404.00 granted upon his application at age 65, rather than his previous early retirement award of only

$279.00, should have increased his railroad retirement annuity proportionately; and (2) that as a "dual vested employee" he is entitled to receive his railroad annuity without reduction for social security benefits or, in the alternative, at no less than the amount he would have received from both his railroad retirement *and* social security under the provisions of the Railroad Retirement Act of 1937.

The various changes in claimant's annuity computation since the filing of his claim in 1981 are too numerous to set forth and not essential to this appeal. It will suffice to say that claimant's total monthly benefit amount at the time of the final decision from the Railroad Retirement Board (the Board) on October 22, 1984, was $638.07, and he claims his correct amount should range anywhere from $714.40 to $906.60.

I. Factual and Procedural History

Plaintiff last worked for the railroad in 1971 after twenty-three and one-half years of service. By December 31, 1974, he also had earned wages in the requisite number of quarters for coverage under the Social Security Act.

In 1971, when Coker terminated his employment with the railroad, he was covered under the Railroad Retirement Act of 1937, 45 U.S.C. § 228(a) *et seq.* (amended 1974), which allowed an individual with at least ten years of employment with the railroad and sufficient work to establish eligibility under the Social Security Act, 42 U.S.C. § 401 *et seq.*, to draw benefits under both systems. This situation resulted in higher benefit payments to those qualifying under both systems than were received by those with the same years of work experience, but all under one system.[1] In an attempt to eliminate

[1]For example, if 10 years of either railroad or non-railroad employment would produce a monthly benefit of $300.00, an additional 10 years of the same employment at the same level of creditable compen-

this dual benefit windfall, Congress passed the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq.*, which fundamentally restructured the railroad retirement system. It established a two-tier system of benefits, the first tier composed of the employee's combined railroad and non-railroad employment figured at social security rates (the equivalent of a straight social security benefit). *See* § 231b(a). This tier comprises the bulk of the final annuity amount. The second tier provides an additional amount based on railroad service alone. *See* § 231b(b). Finally, for those employees who qualify under § 231(b)(h) of the Act, an additional benefit, called a "vested dual benefit," is provided which, in essence, partially compensates those persons who were eligible for dual benefits under the former Act.[2]

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sation would not double that benefit, but would increase it by some lesser amount to say $500.00. If that 20 years of service had been divided equally between railroad and non-railroad employment, however, the social security benefit would be $300.00 and the railroad retirement benefit would also be $300.00, for a total benefit of $600.00. The $100.00 difference constitutes the "windfall" benefit. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 168 n.1 (1980). *See generally*, S. Rep. No. 1163, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 5702, 5704.

[2]To attain the status of a vested employee, § 231b(h)(1)(A) requires an individual to have:

> (i) rendered service as an employee to an employer, or as an employee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 231a(a)(1) of this title began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Social Security Act [42 U.S.C.A. § 301 *et seq.*] on December 31, 1974, ...

Claimant was determined to have a "current connection" with the railroad on December 31, 1974, pursuant to § 231b(h)(1)(A)(ii) and to satisfy the remaining criteria for eligibility for vested dual benefits under this subsection.

A-3

Coker filed his claim for early railroad retirement benefits in May, 1981 (the month he turned sixty-two), and was awarded an annuity. A few months later, he filed for and began receiving social security benefits of $279.00 per month, which amount was deducted from his railroad annuity. Due to his dissatisfaction with the amount of his benefits, he wrote or called the agency several times to protest their computations.[3] He also revoked his early social security retirement.

Plaintiff subsequently challenged the computation of his benefits and on October 18, 1983, a hearing was held. The decision of the referee, dated May 16, 1984, addressed two issues—whether claimant's annuity was subject to earnings deductions, and whether the amount of his annuity had been properly computed. She found that his annuity was subject to deductions for earnings and that his benefit amount was proper. He appealed this decision to the Railroad Retirement Board, informing them that he had reapplied for social security in May, 1984 (the month he turned sixty-five), and was currently drawing $404.00 per month. The Board issued its decision affirming the appeals referee on October 22, 1984, from which claimant takes this appeal pursuant to the provisions of § 231(g) of the Act.

II. The Railroad Retirement Act of 1974

The legislative history of the Act shows that Congress' purposes in restructuring the 1937 Act were twofold: first, to ensure the fiscal soundness of the railroads and, second, to establish equitable retirement benefits for all railroad employees. The major problem in accomplishing these objec-

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[3]At various points, claimant has protested deductions from his benefits due to his receipt of self-employment income and/or social security benefits, lack of cost of living increases, and benefit cutbacks mandated by the legislature, as well as asserting misapplication and/or misinterpretation of the law by the Agency.

tives was that of "dual beneficiaries," those retirees who were eligible for benefits under both the Railroad Retirement Act and the Social Security Act. These beneficiaries caused a proportionately greater drain on the railroad retirement system than on the social security system. The Senate Report specifically found that "were it not for the problem of dual beneficiaries, the railroad retirement system would be almost completely solvent." S. Rep. No. 1163, 93rd Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5702, 5708. Therefore, the Act was intended to phase out these dual benefits in as equitable a manner as possible.

Section 231b(h) sets forth the method for computing the allowable dual benefit for those eligible employees specified in that section.[4] Basically, the amount of this "vested dual benefit" is computed by adding the amount of social security benefits to which an individual would have been entitled based solely on his railroad service and those based solely on his non-railroad service, and subtracting an amount based on a combination of both social security wages and railroad compensation effective December 31, 1974. The remaining amount is subject to cost of living in increments up to the time of actual retirement, when this benefit amount is frozen. *All* vested employees retiring after December 31, 1974, receive some amount of dual benefits to compensate for § 231b(m), which mandates full reduction for any monthly benefit payable under the Social Security Act.

The annuity amounts payable to all employees retiring after December 31, 1974, are to be computed under § 231b[5] with one possible exception. Section 231b(f)(2), a so-called "grandfather clause," mandates that no employee drawing under the new Act will draw less than he would have been

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[4] *See supra* n.2.

[5] "Section 3 (45 U.S.C. § 231b) specifies the benefits that will be payable to railroad employees *who retire after December 31, 1974....*" S. Rep. No. 1163, *supra*, n.1, at 5715 (emphasis added).

entitled to under the provisions of the Railroad Retirement Act of 1937.

This complex mechanism ensures the eventual phase out of dual beneficiaries and brings the annuity entitlement of railroad employees in line with the benefits available to those drawing under Title II of the Social Security Act. While it admittedly distinguishes between former retirees, those with "vested" rights, and those future retirees ineligible for any dual benefit, the Supreme Court has upheld these classifications since railroad retirement benefits, like social security benefits, are not contractual and may be altered or even eliminated by Congress at any time. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174 (1980). Therefore, no impermissible discrimination results from the elimination of dual benefits for future retirees covered by the Railroad Retirement Act of 1974.

III. Standard of Review on Appeal

Section 8 of the Railroad Retirement Act of 1974 (45 U.S.C. § 231g) incorporates the judicial review provisions of the Railroad Unemployment Insurance Act (Section 5(f); 45 U.S.C. § 355(f)), and thereby specifically provides that "[t]he findings of the Board as to the facts, if supported by the evidence and in the absence of fraud, shall be conclusive." The law is well settled that a decision of the Railroad Retirement Board regarding entitlement to benefits under the Railroad Retirement Act or the Railroad Unemployment Insurance Act is not to be set aside on judicial review if it is supported by substantial evidence in the record and is not based on an error of law. *Chandler v. Railroad Retirement Board*, 713 F.2d 188, 189 (6th Cir. 1983); *Ogle v. Railroad Retirement Board*, 238 F.2d 233, 234 (6th Cir. 1956). Thus, in order to determine whether there has been an error of law resulting in an improper award of benefits to the plaintiff, we are required to engage in an interpretation of the relevant portions of the Railroad Retirement Act of 1974.

In connection with this task, we note that Congress has given to the Railroad Retirement Board the responsibility of administering the Act. 45 U.S.C. § 231f. The determination of which individuals are entitled to benefits under the Act, and the amount of those benefits, comprises a major portion of the Board's duties. The United States Supreme Court has stated that "[i]t is by now a commonplace that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers of the agency charged with its administration.'" *Environmental Protection Agency v. National Crushed Stone Ass'n,* 449 U.S. 64, 83 (1980) (citation omitted). A reviewing court is to be guided by the principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. *E. I. du Pont de Nemours and Company v. Collins,* 432 U.S. 46 (1977); *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission,* 395 U.S. 367 (1969). Therefore, the Board's interpretation should be upheld if it is not fundamentally inconsistent with the language and purpose of the statute. *Ford Motor Co. v. NLRB,* 441 U.S. 488 (1979); *NLRB v. Iron Workers,* 434 U.S. 335 (1978); *Brotherhood of Railroad Trainmen v. Railroad Retirement Board,* 410 F.2d 353 (3d Cir. 1969).

IV. Plaintiff's Allegations of Error

A. *The effect of plaintiff's increased social security on his railroad annuity.*

We turn now to plaintiff's first assignment of error; namely, that his award of monthly social security benefits of $404.00, rather than the previously determined $279.00, should have resulted in a corresponding increase in his annuity. Section 231b sets out the method for determining an individual's annuity amount. Claimant elected to begin drawing his railroad annuity at age sixty-two rather than waiting until he turned sixty-five. Therefore he suffers an age reduction in his

benefit amount as prescribed by statute. The Board's computations show that he has received all cost of living increases to which he was entitled under the Social Security Act (42 U.S.C. § 415(i)) as applied to both his Tier I benefits and his vested dual benefits. Furthermore, § 231b(m) specifically provides that:

> The annuity of any individual under subsection (a) of this section for any month shall . . . be reduced, but not below zero, by the amount of any monthly benefit . . . payable to that individual for that month under Title II of the Social Security Act (42 U.S.C. § 401 *et seq.*).

45 U.S.C. § 231b(m).

We discern no supportable basis in petitioner's claim that the amount of his social security benefits should affect the amount of his railroad retirement annuity. Rather, the opposite conclusion prevails. His annuity amount was computed under the formula specified in the 1974 Act, and that amount, once established, is clearly subject to *full* reduction for future social security entitlement. It is this feature of the Act that operates most conclusively to bring railroad annuities in line with those which would have been payable under the social security system, a goal clearly established by the legislative history of the 1974 Act. Therefore, we find claimant's first objection to be without merit.

B. *Plaintiff's entitlement as a "dual vested employee" under the Act's "grandfather clause."*

As we understand this portion of claimant's argument, he focuses on § 231(f)(2) as support for his contention that he is guaranteed an amount not less than he would have been entitled to had he retired under the Railroad Retirement Act of 1937. This section specifies, in relevant part:

> If, in the case of an individual whose annuity under section 2(a)(1) of this Act began to accrue prior to

> January 1, 1983, the annuity (before any reduction due to such individual's entitlement to a monthly insurance benefit under the Social Security Act and disregarding any amount provided by subsection (h) of this section) ... is less than the total amount which would have been payable to such individual and his spouse for such month, on the basis of the individual's compensation and years of service, under the provisions of the Railroad Retirement Act of 1937 as in effect on December 31, 1974, ... the annuity of such individual ... shall be increased ... so as to equal such total amount.

45 U.S.C. § 231b(f)(2).

Addressing this argument, the appeals referee specifically found that claimant would have been entitled to a railroad annuity of $309.00 under the provisions of the 1937 Act. Since this amount was less than his applicable annuity rate of $523.98 figured under the provisions of the 1974 Act, he was awarded the higher amount.

Claimant argues for an interpretation of the "grandfather clause" which would allow for payment of not only the 1937 Act amount of $309.00 but accumulated cost of living increases on this amount since 1974 plus his social security benefits, for a total monthly benefit in excess of $900.00. He contends that since this combined sum is greater than his benefit amount under the new Act, he is entitled to the larger amount under this clause.

With regard to the argument for accumulation of cost of living increments, the clause specifically provides that the computation be made under "the provisions of the Railroad Retirement Act of 1937 *as in effect on December 31, 1974.* 45 U.S.C. § 231b(f)(2) (emphasis added). The statutory language clearly restricts the computation to that amount payable as of December 31, 1974, thereby barring allowance for cost of living increases declared subsequent to that date.[6] Therefore, we find this argument without support.

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[6] "Thus, the guaranty amount derived from the provisions of the 1937 Act is *confined* to the amount that would have been payable under that

Finally, plaintiff urges an interpretation of the "grandfather clause," § 231b(f)(2), which would mandate a computation based on the aggregate of his railroad annuity *plus* his social security. We note that the Board has interpreted this clause as allowing for consideration of only railroad compensation and years of service, *excluding* those wages compensable under the social security system.

In reviewing the legislative history for clarification of the purpose and effect of this clause, we find an indication of Congressional intent in a statement contained in the Senate Report, explaining that the clause "would insure that no employee retiring within the next eight years will receive less than he would under the formula as it exists today *computed under the current limit on creditable compensation.*"[7] Creditable compensation under the 1937 Act is limited to that paid to employees of "an express company, sleeping-car company or carrier by railroad." 45 U.S.C. § 228a, subsections (a), (h)(1), and (m), *amended by* 45 U.S.C. § 231 *et seq.* This statement clearly supports the Board's interpretation of § 231b(f)(2) as requiring that the computation under that clause be limited to the amount payable based on railroad earnings alone.

To adopt the interpretation urged by the claimant would allow all employees retiring prior to January 1, 1983, to combine the most favorable elements of *both* Acts to yield the highest possible annuity. However, the clearly expressed Congressional intent in enacting the Railroad Retirement Act of 1974 was the gradual elimination of dual beneficiaries, with

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Act *as of* December 31, 1974 . . . ." S. Rep. No. 1163, *supra*, n.1, at 5735 (emphasis added).

[7]"Indeed, most career railroad employees retiring in the next several years should receive somewhat more benefits if the bill is enacted than they would have received under the old formula as so computed." S. Rep. No. 1163, *supra*, n.1, at 5717.

the "grandfather clause" inserted to ensure only that no retiree drawing under the system as combined receives less than he would have drawn in railroad benefits alone under the former Act.

After review of claimant's remaining objections to his annuity computation, we find that the conclusions reached by the Board and reflected in the calculation of claimant's benefit amount are supported by a reasonable basis in law. Claimant has been found eligible for and granted a "windfall" benefit under § 231b(h) of the Act in the form of a "vested dual benefit," which he is currently receiving in addition to the Tier I and II benefits provided all retirees under §§ 231b(a) and (b). Since we find no error of law in the findings of the Board, its decision is AFFIRMED.

FILED
Dec 3 1986
John P. Hehman,
Clerk

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

NO. 85-3864

JAMIE E. COKER,

Petitioner,

v.

R. A. GIELOW, Chairman, et al., and
UNITED STATES RAILROAD RETIREMENT BOARD

Respondents.

Before: MARTIN, GUY and NORRIS, Circuit Judges.

J U D G M E N T

ON PETITION TO REVIEW a decision of the United States Railroad Retirement Board.

THIS CAUSE came on to be heard on the transcript of record from the said Agency and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Agency in this cause be and the same is hereby affirmed.

It is further ordered that Respondents recover from Petitioners the costs, as itemized below.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

John H. Hehman
Clerk

A True Copy

Issued as Mandate: January 13, 1987

COSTS: None
Filing fee.....$
Printing.....$
Total.....$

Attest:
Gary McCarthy
Deputy Clerk

A True Copy
Arlene C. Coker
Arlene C. Coker, Wife
Attorney-in-Fact

"B"

NO. 85-3864

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 5 1987
John P. Hehman,
Clerk

JAMIE E. COKER,

Petitioner,

v.

ORDER DENYING
PETITION FOR REHEARING

R.A. GIELOW, Chairman; C.J. CHAMBERLIN, Member; J.O. CRAWFORD, Member; MICHAEL ALTMANN, Executive Officer, and UNITED STATES RAILROAD RETIREMENT BOARD,

Respondents.

_____/

Before: MARTIN, GUY, and NORRIS, Circuit Judges.

The petitioner has filed a timely motion for a rehearing. Upon a review of the petitin, we conclude that it raises the same issues as were raised in the original hearing and which were considered by the court. Accordingly, the petitioner's motion for rehearing is DENIED.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

A True Copy.

Attest: Arlene C. Coker
Arlene C. Coker, Wife and
Attorney-in-Fact

"C"

No. 85-3864

F I L E D

Feb. 11,1987

John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES E. COKER, :

Petitioner, :

vs. : O R D E R

R.A. GIELOW, CHAIRMAN, ET AL., :

Respondents :

Upon consideration of the petitioner's motion to recall the mandate and for rehearing of the above-entitled case,

IT IS ORDERED that the motion be, and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

John P. Hehman

A True Copy.

Attest:

Arlene C. Coker

Arlene C. Coker, Wife and
Attorney-in-Fact

"D"

45 U.S.C. 231b (l)
(1) Reductions for increased annuities (1) Except as provided in subdivision (2) of this subsection, if an annuity awarded under section 2(a)(1)(iii)... is increased or decreased either by a change in the law or by a recomputation, the reduction on account of age in the amount of such increase or decrease shall be computed...

(2)The reduction required under section 2(a)(1)(iii)... may be applied separately to each of the annuity amounts computed under subsections (a),(b), and (h) of this section...For this purpose, in any case in which an annuity amount was computed for an individual under the provisions of this Act or of Public Law 93-445 prior to October 1, 1981, an annuity amountcomputed under subsections (a),(b),(c),(d) and (h) of this section, ... and section 204 or 206 of Public Law 93-445 shall be reduced by its proportionate share of the reduction on account of age..."

45 U.S.C. 231a 2(a)(1)(iii)

"(iii) Individuals who have attained the age of sixty-two and have completed less than thirty years of service, but the annuity of such individual shall be reduced by 1/180 for each calendar month that he or she is under age sixty-five when the annuity begins to accrue.

"Public Law 96-582 - To amend the Railroad Retirement Act of 1974 to extend certain cost-of-living increases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Railroad Retirement Act of 1974 is amended by inserting (2) after "g" and by inserting at the end thereof the following new subdivision:
"(2) Those portions of the annuity of an individual as are computed under subsections (b)and(h) of this section shall, if such individual's annuity under section 2(a)(1) of this Act began to accrue on or before June 1, 1981, be increased by 32.5% per centum of the percentage increase, if any...The increase provided under this subdivision shall be effective on June 1, 1981."

45 U.S.C. §231d - 1983 Amendment P.L. 98-76

"Sec. 103(a) Section 5(a) of the Railroad Retirement Act of 1974 is amended--

(1) by striking out "An annuity" at the beginning and inserting in lieu thereof "Subject to the limitations set forth below, anannuity";

(2) by amending paragraphs (ii) and (iii) to read as follows:

(ii) NOT APPLICABLE

"(iii) in the case of an applicant otherwise entitled to an annuity under section 2(a)(1)...where paragraph (ii) does not apply, not earlier than the latest of (A) the first day of the sixth month before the month in which the application therefor was filed, (B) the first day of the month in which the application therefor was filed if the effect of beginning such annuity in an earlier month would result in a greater age reduction in the annuity...

(D) in the case of an applicant otherwise entitled to an annuity under section 2(a)(1)...the first day of the first month throughout which the applicant meets the age requirement for the annuity applied for;"

"Sec. 103(b) The amendments made by this section shall become effective on the first day of the first month beginning after the date of the enactment of this Act, and shall APPLY ONLY WITH RESPECT TO ANNUITIES AWARDED ON THE BASIS OF APPLICATIONS FILED ON OR AFTER THAT DAY."

DATE OF ENACTMENT, August 12, 1983
EFFECTIVE DATE, September 1, 1983